CONSEQUENCES ARISING FROM MISTAKE IN TRANSMISSION OF A TELEGRAPHIC OFFER FOR THE SALE OF GOODS

Through a mistake in the transmission of a telegram, an offer to sell potatoes at $1.35 per hundred was delivered as an offer to sell at 35 cents per hundred, and was promptly accepted. The offeror shipped the potatoes, sending a bill of lading to a bank with draft attached for the amount of the sale at $1.35 per 100. The offeree tendered the amount due at the 35 cent rate both to the bank and to the carrier, and being refused possession, brought replevin. A decision was rendered in favor of the plaintiff by the Kansas City Court of Appeals. *J. L. Price Brokerage Co. v. Chicago B. & Q. R. R. Co.* (1917, Mo. K. C. App.) 199 S. W. 732.

The conclusion of the court was based upon two assumptions: (1) that the offeror must be held for the mistake of the telegraph company; (2) that upon tender of the contract price the offeree's right of possession was complete. It is submitted that with respect to both of the above assumptions, in view of the particular facts of the case, the learned court was in error.

I.

There is much difference of opinion in regard to the test to be applied to the subject of mistake in the matter of offer and acceptance. Some of the leading jurists support the *will theory,* according to which no contract is formed unless the outward expression of the parties' will coincides with their inner will.[1] Others are in favor of what is called the *mercantile theory.* According to this theory a party will be bound whenever the other party reasonably assumed that the outward expression of the will corresponded with the inner will.[2] Still others entertain intermediate views.[3]

Whether an offer erroneously transmitted by an agent or a telegraph company should be governed by the same principles has been subject to dispute. The German Civil Code[4] allows the offer to be avoided under the same conditions as a declaration of intention made under a mistake. In regard to the later the Code provides:[5]

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[1] For example, Savigny, 3 *System des heutigen römischen Rechts,* 264. Berlin, 1840-1848.

[2] "The legal meaning of such acts on the part of one man as induce another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a 'reasonable man,' i. e. a judge or jury, would put upon such acts." Holland, *Jurisprudence* (10th ed.) 256.

[3] See Dernburg, 1 *Pandekten* (7th ed.) 228, note.

[4] Sec. 120.

[5] Section 119 (Wang's translation).

"A person who, when making a declaration of intention, was under a mistake as to its purport, or did not intend to make a declaration of that purport at all, may avoid the declaration if it is to be supposed that he would not have made it with knowledge of the state of affairs and with intelligent appreciation of the case."[6]

Anglo-American law has not yet adopted any definite theory with respect to the general question of mistake.[7] In the matter of the liability of the offeror for a mistake in the transmission of an offer by a telegraph company, the English[8] and Scotch[9] courts and a few American courts[10] hold that the offeror is not bound. The weight of American authority[11] and the better view make the sender responsible for the mistake of the telegraph company and give to him a right of action against the company.

Both the English and the American courts approach the problem from the standpoint of agency, according to which a principal is held for the mistakes of his agent made within the scope of his employment. The explanation of the English cases lies in the fact that in England the telegraph lines are connected with the postoffice and that according to Anglo-American law the Government is not responsible for the negligence of its employees. It seemed unfair to hold the sender liable on account of the carelessness of the telegraph company without giving him any redress against the company. With respect to the American doctrine the contention may be made that a telegraph company is an independent contractor and that the sender should not be held responsible, therefore, for mistakes in the transmission of telegrams. The liability of the sender of the message may be sustained nevertheless on the second theory above indicated,

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[6] A party avoiding a declaration under Sections 119 and 120 must compensate the other party for any damage the latter may have sustained by relying upon the validity of the declaration, not, however, beyond the value of the interest which the other party has in the validity of the declaration. The duty to make compensation does not arise if the person injured knew or ought to have known of the ground on which the declaration was voidable. Sec. 122, Civil Code.

The Japanese Civil Code renders a declaration which does not agree with the inner will void on principle. Section 95 provides as follows:

"An expression of intention is invalid when there is a mistake in the essential element of the juristic act. But when there is serious fault (culpable negligence) on the part of the person expressing intention he himself cannot assert such invalidity." (De Becker's translation.)

[7] Holland, *Jurisprudence* (10th ed.) 255.

[8] *Henkel v. Pape* (1870) L. R. 6 Ex. 7.

[9] *Verdin v. Robertson* (1871, Scot.) 10 Ct. Sess. Cas. 35.

[10] *Pepper v. Telegraph Co.* (1889) 87 Tenn. 554, 11 S. W. 783; *Shingleur v. Telegraph Co.* (1895) 72 Miss. 1030, 18 So. 425.

[11] *Western Union Telegraph Co. v. Shotter* (1883) 71 Ga. 760; *Ayer v. Western Union Telegraph Co.* (1887) 79 Me. 493, 10 Atl. 495; *Sherrerd v. Western Union Telegraph Co.* (1911) 146 Wis. 197, 131 N. W. 341. See also Jones, *Telegraph and Telephone Companies,* sec. 738.

governing mistake in the declaration of will. The sender having chosen the particular mode of communication should make good the promisee's reasonable expectation as induced by the promisor's act.[12] It follows that if there is anything in the message or in the attendant circumstances indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting.[13] In the case under discussion the exceptionally low price indicated in the telegram as received should have aroused the suspicion of the plaintiff that some mistake had occurred.

II.

If it be assumed, for the sake of argument, that the court's conclusion on the subject of mistake was correct, the question is whether the plaintiff was entitled to succeed in his action of replevin. In order to recover he must prove that at the time of the tender of the purchase price of $.35 per 100 he was entitled to immediate possession by virtue of some property right as distinguished from a mere contract right. It is manifest, however, that he had no such right. If the defendant had agreed to sell to the plaintiff potatoes at $.35 per 100 and thereupon declined to deliver them for less than $1.35 per 100 it could hardly be claimed that the plaintiff could replevy the potatoes after tendering $.35 per 100. He could have sued only in an action for breach of contract. The bill of lading in the case does not lead to a different conclusion. The potatoes were apparently consigned to the seller's order and a draft attached for the amount of the potatoes at $1.35 per 100. *Prima facie* these facts show a reservation of title in the shipper. In accordance with mercantile custom the shipper indicated in this manner that he did not intend to part with the legal title to the goods until the payment of the draft.[14] The buyer would thus have only a contract right for the delivery of the potatoes on tender of the purchase price, unless the special facts of the case disclosed an intention to confer upon him a property right. Such an intention may be inferred, perhaps, under ordinary circumstances, where it is reasonable to suppose that the

[12] See Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations*, 26 YALE LAW JOURNAL 169, 205.

The above constitutes also the ground upon which Section 120 of the German Civil Code rests. The Anglo-American doctrine that a principal is responsible for the negligent act of his agent within the scope of his employment is not recognized in Germany nor on the continent in general.

[13] *Ayer v. Western Union Telegraph Co.* (1887) 79 Me. 493, 499; 10 Atl. 495, 497; *Germain Fruit Co. v. Western Union Telegraph Co.* (1902) 137 Cal. 598, 70 Pac. 658.

[14] *Turner v. The Trustees of Liverpool Docks* (1851) 6 Ex. 543; *Dows v. National Exchange Bank* (1875) 91 U. S. 618; *Portland Flouring Mills Co. v. British Marine Insurance Co.* (1904, C. C. A. 9th) 130 Fed. 860.

buyer was to bear the risk of loss incident to the transportation of the goods. In such an event the courts would say that the consignor retained only a special property right. Upon a proper analysis the situation would in such a case be the same as if the seller had passed the title to the purchaser and the latter had given back to the former a purchase-money mortgage. The seller would thus have reserved the bare legal title for purposes of security only, the purchaser having obtained the beneficial ownership.[15] But if this theory be applied to the present case, it would seem clear that, whatever the seller's legal obligations, the "mortgage" right which he had in fact reserved was for $1.35 per 100. This conclusion rests, not on his undisclosed intention, but on the necessary interpretation of his acts in connection with the shipment. If these acts were sufficient to confer any property right on the buyer, it was only a right subject to the shipper's title by way of security to the amount of the draft. And as the buyer had never consented to receive any property right in the goods (and accompanying risk of loss) on these terms, it would follow that no title or property right whatever passed to the buyer.

This conclusion is supported by direct authority in a case even stronger in the buyer's favor, in that the bill of lading was made out to the buyer, but forwarded to a bank with draft attached for an amount claimed to be excessive.[16] In such a case the seller retains as security, not legal title, but what is called the *jus disponendi*—a right in the nature of a lien. But the extent of the right retained is measured, not by his contract obligation as interpreted by the court, but by his acts in connection with the shipment, or specifically by the amount of the draft which accompanies the bill of lading.

REMOVAL OF CAUSES: THE DOCTRINE OF EX PARTE WISNER

Among other cases on the subject of removal to the federal courts discussed in the February number of the present volume of the YALE LAW JOURNAL, the decision in *M. Hohenberg & Co. v. Mobile Liners, Inc.* (1917, S. D. Ala.) 245 Fed. 169, was noted.[1] The case was stated as one in which a citizen of one state sued a citizen of another state in a state court of a third state; and the holding that the defendant might remove to the federal court for the district within which the suit was pending was described as directly in conflict with the decision of the United States Supreme Court in *Ex parte Wisner*.[2]

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[15] See Williston, *Sales*, sec. 284, p. 418 f. This is also the rule adopted in the Uniform Sales Act, sec. 20 (2). The principal case, however, did not come under the act.

[16] *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.* (1905) 72 S. C. 450, 52 S. E. 191.

[1] 27 YALE LAW JOURNAL, 567.

[2] (1906) 203 U. S. 449, 27 Sup. Ct. 150.